United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

No. 74-2191

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, ESTHER SKIPPER, Individually and on Behalf of All Similarly Situated Non-Supervisory Female Employees of American Telephone and Telegraph Company, Long Lines Department, *Appellants*,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, LONG LINES DEPARTMENT, *Appellee*.

On Appeal from the United States District Court for the Southern District of New York

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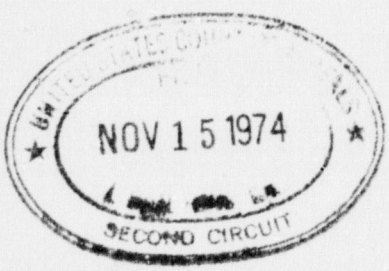
BRIEF FOR APPELLEE



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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE ISSUE PRESENTED

The single issue certified for review is whether the Supreme Court decision in *Geduldig* v. *Aiello*, — U.S. —, 94 S. Ct. 2485 (1974), has established that disparity between the treatment of pregnancy-related and other disabilities does not of itself constitute discrimination on the basis of sex within the prohibition of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, *et seq.*

COUNTERSTATEMENT OF THE CASE

I. Proceedings Below

Plaintiffs-appellants Esther Skipper and the Communications Workers of America, AFL-CIO, commenced this action on July 31, 1973, against defendant-appellee American Telephone and Telegraph Company, Long Lines Department ("Long Lines"). The Complaint alleged that Long Lines is in violation of the prohibition against discrimination on the basis of sex contained in Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.* ("Title VII"), in that:

> Long Lines has promulgated and maintained policies, practices, customs and usages which limit the employment opportunities of its female employees because of sex by failing and refusing to provide equal rights, benefits and privileges to females under temporary disability due to pregnancy or child birth or complications arising therefrom, as are made available to its male employees under temporary disability. [App. at 19a].[1]

Long Lines' Answer (App. at 25a) admitted that pursuant to its "Plan for Employees' Pensions, Disability Benefits and Death Benefits," sickness and injury disability benefits are not paid to employees absent because of conditions attendant to normal pregnancy, childbirth, or childrearing (App. at 27a), but specifically denied that its policies with respect to temporary disability discriminate on the basis of sex within the meaning of Title VII (App. at 30a).[2]

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[1] References to the Joint Appendix for this appeal will be cited as "App. at —."

[2] Long Lines asserted several additional affirmative defenses, and, since the Plan is subject to collective bargaining, a Counterclaim against appellant Communications Workers of America, AFL-CIO, none of which are at issue on this appeal. However, in response to the statement at p. 9 of appellants' brief that CWA sought to bargain with AT&T in 1971 concerning the exclusion of normal pregnancy from the disability benefits program, it should be noted that this request was made in October of that year, *three months after bargaining had been completed* and a new three-year contract ratified which involved substantial increases in labor costs.

On June 26, 1974, the District Court scheduled argument for July 11, 1974, and invited briefs from the parties as to whether the Complaint should be dismissed by the Court *sua sponte,* in light of the Supreme Court decision in *Geduldig* v. *Aiello,* — U.S. —, 94 S. Ct. 2485 (1974) (rendered on June 17, 1974). By opinion and Order dated July 31, 1974, the District Court dismissed the Complaint, with leave to replead, and certified to this Court pursuant to 28 U.S.C. 1292(b) the question of whether *Aiello* has established that the exclusion of normal pregnancy from coverage under a disability benefits plan does not of itself constitute discrimination on the basis of sex within the prohibition of Title VII. 379 F.Supp. 679 (S.D.N.Y. 1974). Appellants' Petition for Leave to Appeal was granted by this Court on September 3, 1974.

II. Statement of Facts

For purposes of the District Court's decision below and resolution of the issue presented on this appeal, the facts are simple and not in dispute. Long Lines has a "Plan for Employees' Pensions, Disability Benefits and Death Benefits" (the "Plan") which provides weekly wage continuation benefits to active employees with at least six months of service who become temporarily disabled to work by reason of non-occupational sickness and injury. Payments under the Plan commence on the eighth calendar day of disability and continue up to a maximum of fifty-two weeks. The Plan covers absences from scheduled work of active employees which are due to sickness, injury or elective surgery provided that the employee furnishes Long Lines with documentation concerning the condition and the treatment. Benefits are provided under the Plan to active employees for absences resulting from disabling complications of pregnancy and abnormal pregnancies, but not for absences attributable to normal pregnancy and childbirth. Benefits are provided under the Plan for absences due to the causes and under the conditions described above with-

out regard to the sex of the employee; there is no condition which is covered when experienced by males and excluded when experienced by females, and there is no condition which is covered when experienced by females and excluded when experienced by males. Nor is there any difference on the basis of sex in the computation of benefits employees receive for covered disabilities (App. at 296a-298a).

INTRODUCTION

As is apparent from the opinion of the District Court below and the question which it certified to this Court for review, the sole issue properly before the Court is whether the exclusion of normal pregnancy from a disability benefits plan in and of itself constitutes discrimination on the basis of sex. That is the issue which the District Court answered in the negative below, prompted by the Supreme Court's decision in *Aiello*, and it is the only issue which the appellants are entitled to raise under 28 U.S.C. § 1292(b).[3]

Questions as to how such an exclusion could be *justified*[4] if it were found to be sex-based, or what the standards should be in determining whether the exclusion itself is a *pretext*[5] for sex discrimination, or other matters unre-

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[3] *See* 9 MOORE'S FEDERAL PRACTICE § 110.25[1], 270 (1973):

> [W]here an interlocutory appeal is taken, as from an order granting an injuntion, the appellate court will not go any further into the merits of the case than is necessary to decide the matter upon appeal.

See also, Sheridan v. Liquor Salesmen's Union, Local 2, 444 F.2d 393 (2d Cir. 1971).

[4] Appellants' contentions as to the standard for justification of sex-based employer practices are not only out of place on this appeal, see p. 11, *infra*, but also are not necessarily an accurate statement of the law. *See* n. 33, *infra*, and accompanying text.

[5] The Supreme Court in *Aiello* largely disposed of this issue in its holding that a claim that a disability benefits plan is sex-based is refuted by a showing that women are not disadvantaged in terms of the aggregate risk protection which they derive from it. — U.S. —, 94 S.Ct. at 2492 n. 20. *See also* n. 37, *infra*, and accompanying text. Thus, if, as the Court held, Long Lines need not treat normal pregnancy as it treats sicknesses and injuries covered by its disability benefits plan, the only remaining inquiry can be whether its

lated to Long Lines' disability benefits program are not presented by this appeal. A considerable portion of appellants' brief is nonetheless devoted to discussion of these extraneous legal issues [6] and is replete with references to "facts" allegedly describing Long Lines' leave policies relating to maternity and the overall status of women under Long Lines' employment practices and those of American industry in general.[7] None of these matters are germane to the single question certified for review. Accordingly, Long Lines will not engage in discussion of these extraneous issues which appellants have sought to inject into this appeal, but rather will address only the issue properly before the Court. The argument which follows demonstrates that the District Court properly concluded that

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leave policies as applied to pregnancy are a pretext for discrimination on the basis of sex. Although appellants are, of course, free to pursue this issue in the trial court, it is readily apparent that Long Lines' leave policies do not disadvantage pregnant employees in any respect, compared to employees on other forms of leave except for purposes of military service. *See, e.g.*, App. at 38a, 60a-68a, 72a-74a, 80a-83a, 105a-106a, 112a-115a. Moreover, Long Lines' military leave policies are largely dictated by statute. 50 U.S.C. App. § 459.

[6] Brief for Appellants at 37-44.

[7] *See, e.g.*, Brief for Appellants at 6-9, 23-25, 33-34. Because of their irrelevance, it is unnecessary to comment at any length on these assertions, although Long Lines must point out that these "facts" are drawn largely from discovery materials in a different case now pending before Judge Tyler in the Southern District of New York, CWA v. New York Telephone Co., Civ. No. 74-3352, and from the so-called "Copus Report" which was not an objective EEOC study but was admittedly a "counsel's exhibit" prepared for an adversary proceeding before the Federal Communications Commission. FCC Docket No. 19143, T. 107. This document was recognized by the Hearing Examiner as "not evidence" but simply as a statement of what EEOC counsel "is hoping to prove by the subsequent witnesses and documents that are being supplied . . ." FCC Docket No. 19143, T. 113. Moreover, one of the principal exhibits on which the "Copus Report" relied was a set of summaries of Bell System documents prepared by EEOC. These summaries were not admitted in evidence during the hearings in the FCC proceeding because a number of them were shown to be one-sided and misleading and therefore "incomplete." FCC Docket No. 19143, T. 233. Revised versions of these summaries were finally included in the record of the proceeding along with the substantial remaining Bell System objections to their accuracy. FCC Docket No. 19143, T. 8188-97.

the exclusion of normal pregnancy from a disability benefits plan does not constitute discrimination on the basis of sex.

ARGUMENT

I. The Supreme Court Has Decided That the Exclusion of Normal Pregnancy from Coverage Under a Disability Benefits Plan Does Not Constitute Discrimination on the Basis of Sex.

In *Aiello,* the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment does not require California to cover absences due to normal pregnancy under a state-administered disability benefits plan. Recognizing that California had engaged in a legislative classification by dividing all possible risks of disability into those which are covered under the plan and those which are not,[8] the Court proceeded to determine whether that legislative judgment had a rational basis under traditional Fourteenth Amendment standards.[9]

In the course of determining that the California program did not discriminate against *any* definable group or class, the Court explicitly held that the exclusion of pregnancy did not constitute discrimination on the basis of sex, noting that "[t]here is no risk from which men are protected and women are not."[10] This conclusion was reached entirely independently of its finding that the classification which California *had* made was fully justified. The decision pro-

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8 — U.S. at —, 94 S.Ct. at 2491.

9 The Court found such a basis in California's legitimate interests in "maintaining the self-supporting nature of its insurance program;" in "distributing the available resources in such a way as to keep benefit payments at an adequate level for disabilities that are covered, rather than to cover all disabilities inadequately;" and in "maintaining the contribution rate at a level that will not unduly burden participating employees." Finally, the Court found that "the selection of risks insured by the program" did not "discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program." — U.S. at —, 94 S.Ct. at 2491-2492.

10 — U.S. at —, 94 S.Ct. at 2492.

duced a dissent from Justice Brennan which adopted the view advanced by the appellants in this case:

> . . . by singling out for less favorable treatment a gender-linked disability peculiar to women, the State has created a double standard for disability compensation: a limitation is imposed upon the disabilities for which women workers may recover, while men receive full compensation for all disabilities suffered, including those that affect only or primarily their sex, such as prostatectomies, circumcision, hemophilia and gout. . . . *Such dissimilar treatment of men and women on the basis of physical characteristics inextricably linked to one sex inevitably constitutes sex discrimination.*[11]

The majority directly rejected this contention, in language responsive to the dissent and dispositive of the issue presently before the Court:

> The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed* v. *Reed*, 404 U.S. 71, and *Frontiero* v. *Richardson*, 411 U.S. 677, involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes *one physical condition*—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, *it does not follow that every legislative classification concerning pregnancy is a sex-based classification* like those considered in *Reed, supra*, and *Frontiero, supra. Normal pregnancy is an objectively identifiable physical condition with unique characteristics.*
>
> * * *
>
> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. *The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While*

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[11] — U.S. at —, 94 S.Ct. at 2494 (emphasis added).

the first group is exclusively female, the second includes members of both sexes.[12]

The Court in footnote 20 thus expressly held that the exclusion of pregnancy from coverage under a disability program does not constitute gender or sex discrimination.[13]

II. The Supreme Court's Decision in Aiello Is Fully Applicable to Employer Disability Benefits Plans Under Title VII.

The logic of the Supreme Court's decision in *Aiello* is fully applicable to cases involving employer disability benefits under Title VII. The threshold question in evaluating the exclusion of normal pregnancy from such a plan under Title VII is the same as that presented under the Equal Protection Clause in *Aiello:* does this exclusion constitute sex discrimination? Appellee is aware of no case, and appellants have cited none, holding that this question must be viewed in a different light if raised under Title VII rather than the Fourteenth Amendment. Indeed, the Equal Employment Opportunity Commission ("EEOC"), AT&T and other parties concerned about the application of Title VII to employer disability plans recognized that the Supreme Court's decision in *Aiello* would have a substantial, if not controlling, effect on interpretations under Title VII. For this reason, many of them filed *amicus curiae* briefs in that case on the issue of whether the exclusion of

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12 — U.S. —, 94 S.Ct. at 2492, n. 20 (emphasis added). Accordingly, this holding cannot be twisted, as appellants and the EEOC have tried to do, into a constitutional authorization to *require* coverage of pregnancy under a statute prohibiting "sex discrimination." Brief for Appellants at 18, and Brief for EEOC as *Amicus Curiae* at 20.

13 Because of its holding on this question, the issue of whether classifications based on sex are inherently "suspect" within the meaning of Fourteenth Amendment standards, which divided the Court in *Frontiero* v. *Richardson*, 411 U.S. 677 (1974), was not reached in *Aiello*. Thus, Justice White, who adopted the view that classifications based on sex are "suspect" in *Frontiero* and must be justified by a "compelling" state interest, joined the majority in *Aiello* in applying the "rational basis" test to the classification based on pregnancy there at issue.

absences due to normal pregnancy from a disability benefits plan constitutes sex discrimination. As the EEOC stated in its *amicus* brief to the three-judge court in *Aiello:*

> The United States Equal Employment Opportunity Commission files this brief because it believes the standards the Court should apply in determining the constitutionality of § 2626 of the California Unemployment Insurance Code are similar to the standards which would be applied to the same policy if it were challenged under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-*et seq.*, as amended by the Equal Employment Opportunity Act of 1972, P.L. 92-261, 86 Stat. 103 (March 24, 1972).[14]

Moreover, the preceding section of this brief noted that Mr. Justice Brennan, in his dissent in *Aiello* (quoting at length from the EEOC's brief setting forth its interpretation of Title VII) asserted that the exclusion of normal pregnancy from a disability benefits plan constitutes sex discrimination, at least if a comparable and exclusively male condition is not also excluded. The majority emphatically rejected that analysis, stating that such an exclusion is not sex discrimination—

> [a]bsent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other....[15]

Finding no evidence that the selection of risks covered discriminated against women in terms of their "aggregate risk protection" the majority decided that the exclusion was neither directly nor by pretext sex discrimination.

As the District Court held below, this same approach should be used in determining whether an employer dis-

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[14] Brief for the EEOC as *Amicus Curiate* in *Aiello* v. *Hansen*, 359 F. Supp. 792 (N.D. Calif. 1973), *reversed sub nom. Geduldig* v. *Aiello*, — U.S. —, 94 S.Ct. 2485 (1974), at 1.

[15] — U.S. at —, 94 S.Ct. at 2492 n. 20.

criminates on the basis of sex within the meaning of Title VII by not offering the same benefits for normal pregnancy as for accidents and sicknesses and other temporary disabilities. Judge Knapp correctly held that *Aiello* is controlling on this issue since footnote 20 of that opinion "flatly states that distinctions involving pregnancy do not constitute discrimination because of sex (or gender)."[16]

Throughout their Brief, Appellants seek to escape the clear and dispositive holding of *Aiello* by arguing that the Supreme Court's decision can be distinguished from the instant case because deference is to be accorded under the Fourteenth Amendment to state legislative judgments on social welfare matters, but no such deference is warranted under Title VII to allegedly discriminatory employer action. This argument can fare no better here than it did below where Judge Knapp disposed of it succinctly:

> [T]he flaw in this argument is that it begs the question...
>
> [I]f the *Aiello* Court had found that the California scheme did discriminate on the grounds of sex (or gender) but must nevertheless be upheld because of the deference due to California's sovereign right to make choices in methods of providing social welfare, the holding would clearly be inapplicable to a case arising under Title VII where no such deference is required. But such, as we read it, was not the holding of the Court. *The holding was that California's treatment of pregnancy related disabilities did not in and of itself constitute a discrimination based on sex* (or gender). *Such a holding precludes relief under Title VII even more clearly than under the Fourteenth Amendment* Under the Amendment it would be open to pregnant women to argue that it was irrational to single them out as a class even if the singling out were not sex related. No such argument is open under Title VII, which deals only with discrimination "because of . . . sex." 42 U.S.C. § 2000e(2)(a)(1).[17]

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[16] 379 F. Supp. at 681.

[17] 379 F. Supp. at 682 (emphasis added).

Appellants argue strenuously that practices which are permissible under the Fourteenth Amendment may nevertheless violate Title VII.[18] However, the cases cited for that proposition address only the distinctions which may be involved between *justifying* practices initially found to be discriminatory. Moreover, those cases are contrary to persuasive authority holding that the standards of justification under Title VII and the Fourteenth Amendment should be the same.[19] As stated by this Court in *Chance* v. *Board of Examiners*,[20] it would be "anomalous at best" if public and private employers were held to different standards under Title VII and the Fourteenth Amendment in cases challenging allegedly discriminatory employment practices.[21]

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[18] Brief for Appellants at 42-44.

[19] There can be no doubt that the development of equal employment opportunity law under Title VII has been significantly affected by concepts first enunciated in equal protection cases. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971), *citing* Gaston County v. United States, 395 U.S. 285 (1969) (re educational disadvantage and voting standards); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), *citing* Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972); and Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972) (both equal protection cases). *See also*, Papermakers Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970), *citing, e.g.*, Louisiana v. United States, 380 U.S. 145 (1965) (re facially neutral standards in voting registration as perpetuating past discrimination).

[20] 458 F.2d 1167, 1176 (2d Cir. 1972).

[21] *Accord*, U.S. v. Chesterfield County School District, 484 F.2d 70, 73 (4th Cir. 1973) ("... the test of validity under Title VII is not different from the test of validity under the Fourteenth Amendment.")

EEOC mistakenly contends at p. 20 of its *amicus* brief herein that by extending Title VII coverage to employees of state and local governments in 1972, Congress intended to afford them the protections of Title VII's "more stringent" standards. However, it is clear that Congress' intent in 1972 was rather to provide government employees with an administrative forum for the redress of employment discrimination claims as had been provided to employees in the private sector by the 1964 Act. *See, e.g.*, House Rep. No. 92-238, 92d Cong., 1st Sess. (1971), at 18; Sen. Rep. No. 92-415, 92d Cong., 1st Sess. (1971), at 10-11.

The plain teaching of *Aiello* thus is that, absent a showing of pretext, a case of sex discrimination is not established by proof that a disability benefits plan treats normal pregnancy differently from disabilities due to other causes. The Supreme Court has therefore confirmed its view of the uniqueness of pregnancy which it strongly implied in *Cleveland Board of Education* v. *La Fleur*.[22] In *La Fleur*, both the maternity policies approved and those disapproved by the Court were applied by the Board to pregnant women but not to persons otherwise disabled. The Court, however, recognized the unique nature of pregnancy by resolving the Fourteenth Amendment challenge on due process grounds even though the parties and the courts below had framed the issue in terms of whether a sex-based equal protection claim had been stated.

The applicability of *Aiello* to Title VII cases and the correctness of the decision below are further illustrated by Supreme Court decisions in Title VII cases which similarly hold that a Title VII violation does not exist simply because one aspect of an employer policy can be identified which affects employees of one sex, race or ethnic group differently from another. The Supreme Court did use such a "disparate effect" analysis to find that past discrimination was being perpetuated through non job-related qualification standards in *Griggs* v. *Duke Power Co.*[23] However, in subsequent cases where the challenged practice did not result in a clear pattern of discrimination, the Court has used an *Aiello*-like analysis to determine whether the practice under attack is a pretext for discrimination.

For example, in *Espinoza* v. *Farah Manufacturing Co.*,[24] the Supreme Court affirmed the decision of the Fifth Circuit that an employer did not discriminate on the basis of national origin simply because it refused to employ aliens.

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[22] 414 U.S. 632 (1974).

[23] 401 U.S. 424 (1971).

[24] 414 U.S. 86 (1973).

The Court acknowledged that "there may be many situations where discrimination on the basis of citizenship would have the effect of discriminating on the basis of national origin" as where citizenship is used as a pretext to disguise ethnic discrimination.[25] However, the Court found that the company's employment of persons having the same national ancestry as the plaintiff was disproportionately high in the job for which the plaintiff applied, and therefore concluded that the refusal to employ aliens was not a pretext for discrimination.[26]

A similar analysis was followed in *McDonnell Douglas Corp.* v. *Green.*[27] There, the Supreme Court reversed and remanded a lower court decision which had held that an employer discriminated against a black employee by refusing to rehire him because of his involvement in a civil rights demonstration which unlawfully obstructed access to the employer's work place. While stressing that Title VII does not permit an individual's prior unlawful conduct to be used as a pretext for racial discrimination, the Court concluded that

> . . . in the absence of proof of pretextual or discriminatory application of such a reason, this cannot be thought the kind of "artificial, arbitrary, and unnecessary barriers to employment" which the Court found to be the intention of Congress to remove. *Id.* at 431.[28]

In these cases, the Supreme Court has called for review under Title VII of whether challenged employment prac-

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25 414 U.S. at 92.

26 *Id.* at 93. As a result of its holding, the Court declined to give significance to an EEOC *Guideline* declaring refusal to hire aliens to be a violation of Title VII since the *Guideline's* premise ". . . that discrimination on the basis of citizenship has the effect of discrimination on the basis of national origin—is not borne out." 414 U.S. at 93. For a fuller discussion of the appropriate treatment of EEOC *Guidelines* in such cases, *see* discussion at pp. 17-21, *infra.*

27 411 U.S. 792 (1973).

28 411 U.S. at 806.

tices (which are not arbitrary barriers to employment—such as non job-related tests) are pretexts for discrimination. Appellants, on the other hand, urge upon this Court the simplistic view that because Long Lines' Plan excludes normal pregnancy, and only women become pregnant, the Plan has a "disparate effect" upon women which constitutes a *prima facie* case of sex discrimination.[29] This argument ignores the holding of *Aiello* on this precise point, and the facts of this case.[30] In answer to the same contention, which was embraced by the dissent in *Aiello,* the Supreme Court held that the dispositive factor is not whether an isolated condition is covered or not, but whether there is any condition which is covered for one class but not for another, *i.e.,* whether the "aggregate risk protection" derived from the plan discriminates against the complaining class.[31] It is apparent from the record that Long Lines' Plan satisfies the criteria thus established in *Aiello* for nondiscrimination: there is no condition which is covered when experienced by males and excluded when experienced by females, and *vice versa* (*App. at 297a*).

Appellants' effort to find support in *Phillips* v. *Martin Marietta Corp.*[32] serves only to emphasize the consistency of *Aiello* with the Court's previous rulings under Title VII. In *Phillips*, the employer had different hiring policies for males and females having pre-school age children. Such discrimination on the basis of sex was unlawful, the Court held, at least without a showing that it was based upon

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[29] Brief for Appellants at 33-37.

[30] *See* App. at 298a.

[31] — U.S. at —, 94 S.Ct. at 2492:

> There is no evidence in the record that the selection of risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program. There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not. [Footnotes omitted].

[32] 400 U.S. 542 (1972).

factors "relevant to job performance." [33] Long Lines' disability benefits policies here at issue, on the other hand, do not differentiate between males and females with identical conditions; it is pregnancy, not parenthood, which is unique. As the Court expressly stated in answer to the same contention in *Aiello*:

> Normal pregnancy is an objectively identifiable physical condition with unique characteristics. [34]

Obviously, the pregnant female is no less unique and no more comparable to the male with, for example, a broken leg, for purposes of Long Lines' disability benefits plan than for California's, since each "pays benefits to persons in private employment who are temporarily unable to work because of disability not covered by workmen's compensation." [35] Indeed, pregnancy is a unique condition of employees not simply because it occurs only to women but because of its multiple effects on the employment relationship. No other condition causing absences from work even approaches it in terms of voluntariness, anticipated cost of coverage and the rate of non-return to employment. [36] Therefore, the application of *Aiello* to Title VII is entirely consistent with the views expressed by the Court in *Phillips*.

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[33] 400 U.S. at 544. Although thus concluding that the employer's practice was based on sex, the Court stated that it might nonetheless be justifiable if the obligations attendant upon parenthood were "demonstrably more relevant to job performance for a woman than for a man." *Id.* This suggests a far less stringent standard for justifications under Title VII than the definitions of "business necessity" and "bona fide occupational qualifications" which have been enunciated by various Courts of Appeal. Although the issue of the proper standard is not presented by this appeal, it should be noted that it remains an open question, especially in light of the Supreme Court's characterization of the employer's burden in *McDonnell Douglas Corp.* v. *Green*, *supra*, as one of demonstrating a "rational, neutral business justification." 411 U.S. at 806 n. 21.

[34] — U.S. at —, 94 S.Ct. at 2492 n. 20.

[35] — U.S. at —, 94 S.Ct. at 2487.

[36] See discussion in Brief for American Telephone and Telegraph Company as *Amicus Curiae* in *Aiello*, at 8-13, and Appendix. (App. at 118a-137a).

By covering the same disabilities on the same terms and conditions for all employees, regardless of sex, Long Lines affords equal risk protection from its disability benefits plan to males and females alike.[37]

Furthermore, the thrust of appellants' "disparate effect" argument is not limited to disability plans which exclude pregnancy. It would seem that, if appellants' view of the law is correct, an employer might not be able to deny coverage of short-term (or long-term) disabilities if statistics show that a substantially higher percentage of female than male employees suffer such disabilities.[38] The necessary implication of the position advanced by appellants is that the only disabilities an employer can lawfully decline to cover are those which the sexes, and races, and ethnic groups, experience in roughly equivalent percentages. Such a conclusion would stand Title VII on its head by requiring employers, in the name of equality, to extend benefits whenever a protected group would gain a *disproportionate* benefit from such an extension.[39]

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[37] In this regard, it should be noted that the State of California in its Reply Brief at p. 21, described the Bell System program as very similar to its own. Significantly, the Supreme Court in *Aiello* relied upon data concerning the operation of private programs, including the Bell System, in reaching its decision. — U.S. —, 94 S.Ct. at 2492 n. 21. The statistics furnished to the Supreme Court (App. at 118a-137a) and those specifically related to Long Lines (App. at 298a) demonstrate that female employees actually account for a disproportionately *high* percentage of benefits under the Plan.

[38] The Court in *Aiello* specifically rejected this concept of "nondiscrimination." — U.S. at —, 94 S.Ct. at 2491 n. 19.

[39] This is exactly the dilemma which the Supreme Court has refused to create for state welfare programs. In *Jefferson* v. *Hackney*, 406 U.S. 535, 548-49 (1972), the Court rejected the same kind of "disparity" argument urged upon this Court by appellants:

> [G]iven the heterogeneity of the Nation's population, it would only be an infrequent coincidence that the racial composition of each grant class was identical to that of the others. The acceptance of appellants' constitutional theory would render suspect each difference in treatment among the grant classes, however otherwise lacking in racial motivation and however otherwise rational the treatment might be. Few legislative efforts to deal with the difficult problems posed by current welfare programs could survive such scrutiny, and we do not find it required by the Fourteenth Amendment.

III. The EEOC Guideline That Disability Benefits Should Be Provided for Normal Pregnancy Should Be Rejected in This Case.

Even in the face of the ruling by the Court in *Aiello,* appellants contend that the District Court erred in not deferring to the April 1972 *Guideline* of the EEOC, 29 C.F.R. 1604.10(b), providing that disabilities caused by normal pregnancy should be treated the same as disabilities caused by sickness or injury under temporary disability benefits plans.[40] As set forth above, Long Lines submits that the analysis and conclusion of the Supreme Court in *Aiello* and Judge Knapp below have effectively put an end to the debate over the validity of EEOC's *Guideline* on this question. Moreover, while those decisions are the most definitive statements of reasons why this Court should reject the EEOC *Guideline*, the *Guideline* also lacks those attributes which would otherwise warrant this Court's deference.

Administrative interpretations such as those of the EEOC may be entitled to "great deference" under appropriate circumstances,[41] but "[c]ourts are free to substitute their judgment for such an administrative interpretation."[42] It has also been specifically held that EEOC interpretations of Title VII are neither binding on the courts[43] nor entitled to "blind adherence",[44] and where they conflict with the terms of the statute, they are invalid.[45]

Courts adopting certain interpretations of Title VII set forth in EEOC *Guidelines* routinely cite *Udall* v. *Tallman*[46]

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40 Brief for Appellants at 29-33.

41 Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971).

42 Brennan v. General Telephone Co., 488 F.2d 157, 160 (5th Cir. 1973).

43 H. Kessler & Co. v. EEOC, 472 F.2d 1147 (5th Cir. 1972).

44 Espinoza v. Farah Manufacturing Co., 462 F.2d 1331 (5th Cir. 1972), *aff'd.*, 414 U.S. 86 (1973).

45 Dewey v. Reynolds Metals Co., 429 F.2d 324, 331 (6th Cir. 1970), *aff'd per curiam*, 402 U.S. 689 (1971).

46 380 U.S. 1 (1965).

and *Griggs* v. *Duke Power Co.*[47] for the proposition that "great deference" is due the interpretations of the enforcing agency. But it is important to note that neither *Udall* nor *Griggs* stands for a rule that such interpretations are to be accepted mechanically. In *Udall*, the Court gave deference to the interpretation of the Secretary of the Interior only after a detailed analysis showed that his interpretation had been contemporaneous, consistent, heavily relied upon, and was not unreasonable.[48] In *Griggs*, the Court did not accept the EEOC interpretation until it was convinced by a thorough review of the legislative history that "the conclusion is inescapable that the EEOC's construction . . . comports with congressional intent."[49] The opinions in *Griggs* and *Udall* indicate that the deference due an administrative interpretation depends upon an inquiry into the surrounding circumstances and thus they are consistent with the Court's earlier holding that:

> The weight of . . . [the administrative interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[50]

The importance of these elements was emphasized by the Supreme Court recently in *Espinoza* v. *Farah Manufacturing Co.*, *supra*. In that case, the Court refused to accept an EEOC *Guideline* that a policy of limiting employment to citizens always resulted in national origin discrimination, in the face of the fact that 96% of Farah's employees were, like Espinoza, of Mexican ancestry. In addition, the Court noted that application of the *Guideline* to Farah would be inconsistent with the congressionally approved policy of limiting federal employment to United States citizens. It further recognized that the then-current *Guideline* was inconsistent with prior interpretations of the EEOC. Al-

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47 401 U.S. 424 (1971).

48 380 U.S. at 16-18.

49 401 U.S. at 436.

50 Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

though the Court stated that the EEOC's guidelines were no doubt entitled to great deference," it concluded that "[c]ourts need not defer to an administrative construction of a statute where there are 'compelling indications that it is wrong.' " [51]

Evaluation of Section 1604.10(b) in such terms reveals compelling indications that it too is wrong. While there was no meaningful legislative history concerning the application of the sex discrimination provisions to pregnancy, [52] for the first six years following the effective date of Title VII, EEOC consistently and publicly interpreted the Act as permitting employment practices to take into account the obvious uniqueness of pregnancy. [53] Thus, at least through 1970, the EEOC's position was that employers must grant maternity leave to pregnant employees but that such absences need not be covered as a paid leave under temporary disability plans. [54]

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51 414 U.S. at 94-95.

52 The provision prohibiting discrimination on the basis of sex was introduced as an amendment to Title VII on the floor of the House, and was the subject of only limited debate.

53 In its First Annual Report to Congress, at pages 40 and 41, the EEOC stated as follows:

> The prohibition against sex discrimination is especially difficult to apply with respect to the female employee who becomes pregnant. In all other questions involving sex discrimination, the underlying principle is the essential equality of treatment for male and female employees. *The pregnant female, however, has no analogous male counterpart* and *pregnancy necessarily must be treated uniquely.* [Emphasis added.]

54 *See, e.g.,* Dec. No. 71-308, Sept. 17, 1970, CCH EEOC Decisions ¶ 6170; Dec. No. 71-562 Dec. 4, 1970, CCH EEOC Decisions ¶ 6184; Dec. No. 70-360, Dec. 16, 1969, CCH EEOC Decisions ¶ 6084; Dec. No. 68-4-538E, June 16, 1969, CCH EEOC Decisions ¶ 6125. EEOC Dec. No. 71-562, Dec. 4, 1970, CCH EEOC Decisions ¶ 6184 cited on p. 29, n. 12 of EEOC's brief, is not authority to the contrary. *See,* discussion, *infra,* n. 56.

During these years, the EEOC's approach to pregnancy continued to follow the Nov. 15, 1966 opinion of its General Counsel, which stated the Commission policy as follows:

> The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex. . . . Accordingly, we believe that to provide substantial equality of employment opportunity . . . there must be special recognition for absences due to pregnancy . . . for this reason . . . a leave of absence should be granted for pregnancy whether or not it is granted for illness.

The Commission's published policy changed abruptly in 1971 with Decision No. 71-1474. This decision, which was published in CCH Employment Practice Report 66, dated May 6, 1971, concluded that the exclusion of pregnancy from coverage under a disability benefits plan was discriminatory when all other non-occupationally related disabilities were covered. The decision did not set forth any further rationale for its conclusion or its failure to follow previous Commission policy. Following Decision No. 71-1474, there is no record of further EEOC pronouncements on this subject until the Commission published its revised *Guidelines* on April 4, 1972, without any accompanying evidentiary support,[55] and without affording any opportunity for public review and comment.[56]

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[55] As one court noted in refusing to follow the new *Guideline*, "There appears to be no factual basis upon which these regulations were drawn." Newmon v. Delta Air Lines, Inc., 374 F. Supp. 238 (N.D. Ga. 1973).

[56] In its brief as *Amicus Curiae* filed with this Court in support of appellants, the EEOC asserts, as it has as *Amicus* before other courts on similar issues, that at least since early 1970, the Commission has consistently held that disparate treatment of pregnancy under disability plans was violative of Title VII, and that Congress had been informed of this interpretation "more than a year prior to the passage of the 1972 amendments to Title VII" through the Commission's Fifth and Sixth Annual Reports. *Brief for the Equal Employment Opportunity Commission as Amicus Curiae*, at 28-29. These contentions have been echoed by appellants in their brief at pp. 30-32.

While the EEOC's contorted efforts to divine "consistency" in its policy on pregnancy and "notice" thereof to Congress prior to the 1972 Amendments to Title VII were startling in previous cases, in this case they can be characterized only as grotesque.

In the first place, the EEOC decisions cited by the Commission at p. 29 of its brief herein as illustrative of the "consistency" of its interpretations *did not* require disability benefits for normal pregnancy but rather required an unpaid leave of absence or seniority credit for this uniquely female condition. EEOC Dec. No. 70-600, CCH EEOC Decisions ¶ 6122, Mar. 5, 1970; EEOC Dec. No. 71-308, CCH EEOC Decisions ¶ 6170, Sept. 17, 1970; EEOC Dec. No. 71-562, CCH EEOC Decisions ¶ 6184, Dec. 4, 1970. Each of these cases cited EEOC Dec. 70-360, *supra*, with approval. That decision held that "pregnancy is a temporary disability unique to the female sex" for which an unpaid *leave of absence* must be provided.

Even more disquieting than the EEOC's misrpresentation of its own decisions, however, is its continued assertion that the Congress was on notice, at the time it enacted the 1972 Amendments, that the Commission viewed the

Long Lines recognizes, of course, that an EEOC interpretation need not be rejected merely because it was adopted some time after the effective date of Title VII, *Bartmess* v. *Drewrys U.S.A., Inc.*,[57] and that the EEOC is not "locked in" to an original position which later proves to have been incorrect. However, in determining whether the EEOC's most recent position on the disability benefits issue is entitled to deference from the Court, it is obviously significant that the 1972 *Guideline* lacks the contemporaneity which was among the attributes found significant in *Udall*,[58] and the consistency and thoroughness emphasized in *Swift & Co.*,[59] and reiterated in *Espinoza*.[60] As in *Espi-*

exclusion of pregnancy from disability benefits plans as unlawful. The only relevant EEOC decision described in the Commission's Fifth Annual Report (at p. 14) is 70-360, discussed in the paragraph above. Moreover, the Sixth Annual Report, which did refer to EEOC Dec. No. 71-1474, *supra*, (in which the Commission first announced the interpretation embodied in its 1972 Guideline), was not sent to the Congress until *after the enactment of the 1972 Amendments.*

In other circumstances, the efforts of the EEOC to infer congressional acquiescence in its current interpretation might be explained as the product of excessively zealous advocacy and oversight. However, in answer to the identical claim by the EEOC in its *amicus* brief to the Fourth Circuit in the pending appeal in *General Electric Co.* v. *Gilbert, appeal docketed,* No. 74-1557, 4th Cir., May 15, 1974, the Reply Brief for General Electric, at pp. 11-12 n. 9, exposed the factual error in the Commission's claim, pointing out that the Sixth Annual Report was not even transmitted to Congress until March 30, 1972, whereas the 1972 Amendments were enacted on March 24, 1972. Long Lines is therefore at a loss to explain the EEOC's attempted resurrection of this totally discredited argument.

[57] 444 F.2d 1186 (7th Cir. 1971).

[58] 380 U.S. at 16.

[59] 323 U.S. at 140.

[60] A further indication that EEOC's current position is erroneous is its variance from the approach of the Wage and Hour Administrator on the same issue under the Equal Pay Act, 29 U.S.C. § 206(d). The Administrator has ruled that payments related to maternity "are not 'wages' to be compared for equal pay purposes." 29 C.F.R. § 800.110. This formulation recognizes that such payments are unique to women and authorizes their payment or non-payment without Equal Pay Act consequences. The current EEOC *Guideline* is also contrary to the position of the Office of Federal Contract Compliance, the other federal agency with a major role in the equal employment area. Executive Order 11246, as amended by Executive Order 11375, prohibits dis-

noza, the EEOC *Guideline* involved in this case is plainly wrong.

CONCLUSION

For all of the foregoing reasons, Long Lines respectfully submits that the Order of the District Court should be affirmed in its entirety.

Respectfully submitted,

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crimination by federal contractors against employees on the basis of sex. Charged with enforcement of the Executive Orders, the OFCC has since 1970 had in effect Sex Discrimination Guidelines which do not require the payment of disability benefits for normal pregnancy. App. at 293a. Although, in the interests of uniformity, the OFCC announced prior to the Supreme Court decision in *Aiello* that it was considering adopting the EEOC position, 38 Fed. Reg. 35336, its announcement also specifically noted that:

> The OFCC, however, recognizes the need to continue to be guided by pertinent judicial decisions, including those expected to be rendered by the United States Supreme Court during this present term. [38 Fed. Reg. at 35337.]

In view of this obvious reference to the then-pending *Aiello* case, it is clear that the OFCC has no basis to change its current position.

CERTIFICATE OF SERVICE

State of New York)
) ss.
County of New York)

I, Madelyn M. DeMatteo, being duly sworn, do depose and say:

That before 5:00 p.m. on Monday, November 18, 1974, two copies of the foregoing corrected Brief for Defendant-Appellee, American Telephone and Telegraph Company, Long Lines Department, was caused to be hand-delivered to:

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Madelyn M DeMatteo

Subscribed and sworn to before
me this 18th day of November, 1974.

Jim G. Kilpatric

JIM G. KILPATRIC
Notary Public, State of New York
No. 31-2114095
Qualified in Kings County
Certificate Filed in New York County
Commission Expires March